Supreme Court, U.S.
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No. 00–1206

IN THE
Supreme Court of the United States

SHIRLEY K. ROGERS, *et al.*,
Petitioners,

v.

WAL-MART STORES, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a district court reviewing a motion to remand for the jurisdictional amount in controversy may rely on verified interrogatories that the plaintiff submitted in an identical previously-filed federal case?

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STATEMENT

Plaintiff's claim—that a court's inquiry into the amount in controversy must be confined to the four corners of the complaint—comes to the Court trailing heavy procedural baggage. On October 17, 1997, plaintiff filed a complaint in Tennessee state court naming Wal-Mart Stores, Inc. as the sole defendant and claiming actual and punitive damages for Wal-Mart's alleged negligence. Wal-Mart removed the case to federal court on diversity grounds, and in 1998 plaintiff submitted verified interrogatory responses identifying her specific out-of-pocket losses as $447,902.46—well over the $75,000 threshold for a diversity action. In October 1998, however, plaintiff missed a court deadline to disclose expert witnesses, and subsequently moved the district court to dismiss her complaint under Federal Rule of Civil Procedure 41(a). The district court complied with the request.

One year later, on October 18, 1999, plaintiff filed a new complaint in Tennessee state court. The claim arose out of the same occurrence and identified the same theories of liability as her previously-dismissed complaint. Apparently hoping to keep this action in state court, plaintiff included an ad damnum allegation in the second complaint that sought damages "not exceeding $75,000.00." Wal-Mart removed based on the complete diversity of the parties, plaintiff's earlier interrogatory response seeking $447,902.46 in actual damages, and Tennessee law which does not limit a damages recovery under state law to what is pled in the ad damnum clause. Plaintiff responded with an affidavit and stipulation that she had no "intention" of seeking additional damages and that her "demand" would not exceed $75,000.

The Sixth Circuit's rejection of this effort to avoid a federal forum adheres to precedent, *see St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283 (1938), does not implicate a division in lower-court authority, and at all events presents a poor vehicle for addressing the questions presented. The petition should be denied.

REASONS FOR DENYING THE WRIT

For more than six decades, it has been settled law that when "the plaintiff after removal, by stipulation, by affidavit, or by amendment of [her] pleadings, reduces [her] claim below the requisite amount, this does not deprive the district court of jurisdiction." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 292 (1938). Every court of appeals to reach the issue has adhered to this approach. *See, e.g.*, Pet. App. 6a; *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1411 (5th Cir.), *cert. denied* 516 U.S. 865 (1995). And no appellate court has ever suggested that a plaintiff may avoid the *St. Paul Mercury* bar on post-removal amendments by instead dismissing the complaint, then refiling it with a less-than-$75,000 ad damnum clause.

Plaintiff does not address the *St. Paul Mercury* bar directly. Nor does she challenge the district court's authority to make a factual determination regarding the amount in controversy that turns on plaintiff's own verified discovery responses. Instead, she petitions the Court on three related questions that entered into the lower court's discussion: (1) whether district courts are "absolutely barred" from considering post-removal stipulations (here, the post-removal affidavit regarding damages filed in the second case); (2) whether removal questions are governed by a preponderance of the evidence test or some other standard; and (3) whether state-court pleading rules should be considered in assessing the amount in controversy of a complaint originally filed in state court.

None of these issues, however, implicates a serious conflict in lower-court authority. And it is not even clear that, when put to the test, the Sixth Circuit's reasoning necessarily implicates these issues at all. For example, it is far from clear what standard of review, or other innovation on *St. Paul Mercury*, would allow a claimant to pretend that a $447,000 verified request for damages in one claim has no relevance to

a second claim against the same defendant that arose from the same accident and relied on the same theory of liability. Whatever the correct rule for assessing the amount in controversy in these circumstances, it is difficult to believe that a verified identification of damages could blithely be ignored in a subsequent action. In the end, these unusual facts present neither the right record nor the right time for reassessing the last 60 years of decisional law in this area.

A. No Conflict Of Authority Exists.

Plaintiff begins by arguing that the Sixth Circuit's decision conflicts with decisions from the Fifth Circuit (as to question 1), the Eleventh Circuit (as to questions 2 and, to some extent, 3), and various district court opinions scattered throughout the past decades. The cases upon which plaintiff relies, however, do not live up to their billing. And no case allows a fact-finder to disregard a verified answer that the plaintiff suffered more than $447,000 in damages from the accident at issue.

1. The Lower Court Decision And *ANPAC v. Dow Quimici de Columbia, S.A.*, 988 F.2d 559 (5th Cir. 1993), Do Not Conflict On The Issue Of Post-Removal Stipulations.

In her first contention, plaintiff argues (Pet. 4-9) that the decision conflicts with *ANPAC v. Dow Quimica de Colombia, S.A.*, 988 F.2d 559 (5th Cir. 1993), *reh'g en banc denied* 5 F.3d 530, *cert. denied sub nom. Dow Chemical Co. v. ANPAC*, 510 U.S. 1041 (1994). In doing so, she contends that the Sixth Circuit, like the Seventh Circuit (Pet. 5 n.2), bars all post-removal stipulations, whereas the Fifth Circuit allows stipulations that "clarify" a damages claim but do not reduce it. Not true.

For starters, plaintiff mischaracterizes the lower-court opinion. It did not turn on stipulations that "clarified" the amount in controversy, but in fact categorically *reduced* it. *See*

Pet. App. 7a ("Therefore, consistent with *St. Paul* and previously unpublished Sixth Circuit opinions, we hold that a post-removal stipulation *reducing* the amount in controversy to below the jurisdictional limit does not require remand to state court.") (emphasis added).) *ANPAC*, meanwhile, depended not on the "clarifying" nature of plaintiffs' stipulation—which in that instance was made because a local rule barred plaintiffs from specifying a damages amount. *See* 988 F.2d at 562 n.1 and 565 n.7. Rather, it turned on the removing defendant's failure to offer anything more than "bare allegations" that the plaintiffs sought relief above the jurisdictional amount. 988 F.2d at 566. Neither court thus premised its decision on "clarifying" stipulations.

What is more, both the Fifth and Sixth Circuits agree that when a plaintiff challenges removal in this setting, the district court must make a factual determination as to the actual amount plaintiff is claiming. *See* Pet. App. 8a ("it was 'more likely than not'" that plaintiff's claims exceeded the jurisdictional amount); *ANPAC*, 988 F.2d at 566 (holding that defendant's "burden has not been met"). Aside from identifying the burden of proof as the defendant's, however, neither court offered any insight into a plaintiff's "clarifying" stipulation.

Nor do the district-court decisions on which plaintiff relies (Pet. 7-8) advance her argument. Conspicuously missing from any of them is a fact pattern like this one—where the post-removal stipulation of less than $75,000 in damages follows a pre-removal stipulation that damages were nearly six times the jurisdictional amount. Add to this the fact that Tennessee law "would have allowed plaintiff to recover damages in excess of what she prayed for," *see id.*, and it becomes clear that none of the lower-court cases (whether from the trial or appellate courts) would have allowed plaintiff to control the amount-in-controversy inquiry through this kind of stipulation. One of plaintiff's case citations in fact confirms this point. *See Angus*

v. Shiley Inc., 989 F.2d 142, 145-46 (3d Cir. 1993). In truth, if there is one principle on which *all* of the courts of appeal agree, it is that a plaintiff who has once alleged damages greater than the jurisdictional amount cannot avoid that concession with a post-removal stipulation, binding or not. *See id.*; *ANPAC*, 988 F.2d at 565 ("a plaintiff may not defeat removal by subsequently *changing* his damage request"); *In re Shell Oil*, 966 F.2d 355, 356 (7th Cir. 1992); *see also* Pet. App. at 8a.

2. *Burns v. Windsor Ins. Co.*, 31 F.3d 1092 (11th Cir. 1994), Does Not Establish A Conflict On The Burden On Proof That Warrants Review.

Plaintiff's second issue—regarding the burden of proof in assessing the amount in controversy of a removed diversity case—does offer a shallow conflict, but no more. Plaintiff argues that the lower court's opinion, which adopted a "preponderance of the evidence" standard, conflicts with *Burns v. Windsor Ins. Co.*, 31 F.3d 1092 (11th Cir. 1994). Any conflict that may exist between the two decisions is shallow at most, however, and in neither case was the framework for review material to the result of the case. The circuits agree, for example, that plaintiffs who allege more than the jurisdictional amount in controversy in their complaints are bound by that allegation. *See Gafford v. General Elec. Co.*, 997 F.2d 150, 157 (6th Cir. 1993); *Burns*, 31 F.3d at 1094 (acknowledging "great weight" given to plaintiff's assessment of her case when ad damnum clause seeks more than jurisdictional amount). The circuits agree that there are intermediate cases where the district court must weigh evidence on the amount in controversy. Pet. App. 4a; *Burns*, 31 F.3d at 1097 (acknowledging that evidence of a settlement offering less than the jurisdictional amount "counts for something"). And the circuits agree that defendants must offer more than conclusory

allegations in order to win removal. Pet. App. 8a; *Burns*, 31 F.3d at 1097.

The last point matters most, and explains why the Sixth Circuit's analytical framework in the end does not conflict with the Eleventh Circuit's. In denying removal when a plaintiff pleads damages less than the jurisdictional amount and when the defendant "offer[s] nothing more than conclusory allegations," *Burns*, 31 F.3d at 1097, the Eleventh Circuit adhered to an approach that every other circuit on record has followed. *See, e.g., Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996) (collecting cases); *Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9th Cir. 1992). Nor has any conflict arisen over the proper evidentiary standard for assessing a defendant's removal petition when the defendant offers evidentiary support. In every case where the defendant offers evidence, the appellate courts have used the "preponderance" standard adopted by the Sixth Circuit. *See, e.g., De Aguilar*, 47 F.3d at 1412; *Gafford*, 997 F.2d at 158; *Gaus*, 980 F.2d at 567; *Singer v. State Farm Mut. Ins. Co.*, 116 F.3d 373, 376 (9th Cir. 1997). The Eleventh Circuit's decision in *Burns* in short simply applies a different standard when the defendant offers no evidence to support removal.

3. Federal Courts Have Always Turned To State Law To Assess The Proper Amount In Controversy.

As a third argument, plaintiff contends (Pet. 12-17) that the Sixth Circuit has somehow jeopardized the "uniform" national standard for removal by suggesting that state law pleading requirements might affect the amount-in-controversy. Here, plaintiff's main concern appears to be that the lower court diverged from the "better practice" advocated by Professor Miller and his coauthors. *Compare* Pet. 16-17 with 14C Wright, Miller & Cooper, *Federal Practice and Procedure* § 3725 at 98-99 (3d 1998). We do not dismiss this point. But the fact is, federal trial and appellate courts have

always used state law as a guidepost for determining whether particular claims could reach the jurisdictional amount—as well it seems they should when it comes to claims that arise under state law. *See, e.g., Iowa Cent. Ry. v. Bacon*, 236 U.S. 305, 309 (1915) ("The state court had the authority to determine the effect of the prayer to the petition"); *De Aguilar*, 47 F.3d at 1415 (state estate law); *Chase v. Shop 'N Save Warehouse Foods, Inc.*, 110 F.3d 424, 429 (7th Cir. 1997) (Illinois ad damnum restrictions); *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Bd.*, 454 F.2d 38, 41-42 (1st Cir. 1972) (local procedures determine whether agency proceeding is removable); *J.W. Petroleum, Inc. v. Lange*, 787 F. Supp. 975, 976 (D. Kan. 1992) (remanding because Kansas law would not allow $100,000 punitive damages claim); *see also* 14C Wright, Miller & Cooper, *Federal Practice* § 3725, at 87 ("this can be done through . . . a state law or procedural rule that limits plaintiff's recovery"). In the last analysis, the Sixth Circuit merely followed a rudimentary principle of removal jurisdiction: A defendant's ability to contest the amount in controversy depends on the extent of the state-law right the plaintiff wishes to vindicate. *Angus*, 989 F.2d at 145-46 ("the amount in controversy is not measured by the low end of an open-ended claim, but rather by a reasonable reading of the value of the rights being litigated"); *Leininger v. Leininger*, 705 F.2d 727, 729 (5th Cir. 1983) ("the amount in controversy, in an action for declaratory or injunctive relief, is the value of the right to be protected or the injury to be prevented"). No principle of removal jurisdiction is more settled than that.

B. The Lower Court Decision Neither Offers The Traditional Hallmarks For Granting Review Nor Squarely Raises The Questions Presented.

To her credit, plaintiff eventually concedes (Pet. 16) that her interests in seeking review extend beyond the three issues she identifies. She ultimately invites (Pet. 16-17) the Court to

use her petition as a vehicle "(1) to "review[] and either . . . reaffirm[] or clarif[y] and possibly embellish[]" *St. Paul Mercury*; (2) "to reexamine *another* aspect of *St. Paul Mercury*, namely whether . . . there . . . is a rational basis for differentiating between the methods and burdens of proving amount in controversy" in both removal diversity cases and those originally filed in federal court; and (3) to encourage a "fresh look" at the entire framework for assessing the amount-in-controversy.

Even accepting all of these concerns as legitimate grounds for review, this case does not present the right vehicle for this sweeping reassessment of removal law. To start, the petition arises in an exceedingly unusual factual posture, one that (it appears) has never arisen before. Recall that plaintiff filed a complaint and verified interrogatories stating that she had suffered injuries of $447,000. The fundamental question is thus not a defendant's burden of proof or state procedural law, but rather whether any appellate court can interfere with the factfinder's right to rely on a plaintiff's first sworn statement. Longstanding federal law in this and other procedural postures suggests that plaintiff's first-verified response would govern, and should govern. *See, e.g.*, *Singer*, 116 F.3d at 376 (district court can accept plaintiff's "judicial admission" as to jurisdictional amount); *Bank of Illinois v. Allied Signal Safety Restraint Sys.*, 75 F.3d 1162, 1168–69 (7th Cir. 1996) (disregarding portions of depositions that conflicted with prior sworn statements); *Hackman v. Valley Fair*, 932 F.2d 239, 241 (2d Cir. 1991) ("When, without a satisfactory explanation, a nonmovant's affidavit contradicts earlier deposition testimony, the district court may disregard the affidavit in determining whether a genuine issue of material fact exists."); *Rohrbough v. Wyeth Labs., Inc.*, 916 F.2d 970, 975 (4th Cir. 1990) (disregarding "conclusory" affidavit that conflicted with earlier deposition testimony). *See also Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806–07 (1999) (acknowledging factfinder's authority to rely on first sworn statement). It is

precisely because plaintiff *is* the "master" of her complaint that these verified admissions in the first complaint cannot suddenly be ignored.

C. The Sixth Circuit Correctly Decided The Issue On The Merits.

The lower court's decision on removal, at any rate, was correct. The federal courts have long recognized that Congress established removal jurisdiction to give out-of-state defendants a neutral forum to litigate claims against them. *See Grassi v. Ciba-Geigy, Ltd.*, 894 F.2d 181, 185 (5th Cir. 1990) ("Congress has created diversity jurisdiction and the right of removal under 28 U.S.C. §1441 for the purpose of protecting non-resident litigants from local prejudice."). *St. Paul Mercury* gives effect to that rule by preventing plaintiffs from altering judicial admissions "by stipulation, by affidavit, or by amendment of the pleadings" solely to divest the federal courts of jurisdiction. *See* 303 U.S. at 292.

The lower court here did nothing more than follow *St. Paul Mercury*'s direction. As multiple courts of appeal have recognized, *St. Paul Mercury* is concerned not with amended complaints *per se*, but rather with a plaintiff's attempts to "manipulate" jurisdiction through artful pleading and repleading. *See, e.g., De Aguilar*, 47 F.3d at 1411; *Chase*, 110 F.3d at 429-30. As *Chase* explained in response to a plaintiff's contention that she should be allowed to file a second complaint that stated a new amount in controversy:

> As we noted again in [*Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993)], allowing a plaintiff to follow the 'wait and see' approach to choosing her forum is unfair to defendants. *Shaw*, 994 F.2d at 367. In addition to this legal instruction, Chase had the added foresight of having been through this song and dance before. She knew that no basis for remand existed under the facts and evidence in the first

> action. She also knew that the district judge considered prior case evidence relevant in future filings of the negligence claim, yet she made no new assertions of the amount in controversy, either in the form of settlement demands or stipulations, before Stop 'N Save removed the second action. Knowing of the almost certain likelihood of removal in the second action if she took no additional steps to avoid the federal forum, Chase's post-removal efforts to force a remand look like the type of procedural manipulation we warned against in *Shaw*.

Chase, 110 F.3d at 430.

The same is true here. Just as *St. Paul Mercury* forbids plaintiffs from amending their complaints to destroy federal jurisdiction, the Sixth Circuit correctly recognized that it forbids plaintiffs from effectively doing the same thing—namely, dismissing the complaint and refiling a new one. That corollary of *St. Paul Mercury* holds particular force where, as in *Chase* and as here, the plaintiff tries the dismissal-and-refiling gambit in a jurisdiction where she can recover amounts greater than she pleads. That of course is just what Tennessee law allows, and presumably explains why a plaintiff can say so many different things about the amount in controversy at so many different times.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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